

DATE: December 29, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-09197

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Sandra Perry

SYNOPSIS

Applicant is a 36-year-old draftsman who has worked for a federal contractor for two years. He has five alcohol related arrests and convictions beginning in 1988 through 2002. He continues to consume alcohol and has made behavior changes in his life. He only listed one of his convictions on his security clearance application. He deliberately falsified his security clearance application. Applicant failed to mitigate the security concerns raised under Guidelines G, alcohol consumption, and Guideline E, personal conduct. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On August 29, 2006, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline G, (alcohol consumption) and Guideline E (personal conduct) of the Directive. Applicant answered the SOR in writing on September 25, 2006, and elected to have a hearing before an administrative judge. In his answer, Applicant admitted all of the allegations under Guideline G except ¶ 1.a. He denied the allegations under Guideline E. The SOR was amended on October 12, 2006 adding an allegation. Applicant was provided proper notice of the amendment and did not object. The case was assigned to me on November 22, 2006. A notice of hearing was issued on November 24, 2006, scheduling the hearing for December 12, 2006. I conducted the hearing as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance. The Government offered nine exhibits for admission in the record and were marked as Government Exhibits (GE) 1-9. The exhibits were admitted into evidence without objection. Applicant testified on his own behalf and offered one exhibit for admission in the record. It was marked as Applicant's Exhibit A and was admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on December 20, 2006.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR, are incorporated herein. In addition, after a thorough and careful

review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 36 years old and has worked for a defense contractor for two years as a draftsman. He has a bachelor's degree in mechanical engineering and is not married. He served in the National Guard for six years and was honorably discharged at the rank of E-4.

Applicant was arrested, charged and convicted of five driving under the influence (DUI) offenses beginning in 1988 and his last in October 2002. His first arrest and conviction occurred on July 25, 1988. He pled guilty to the offense and was sentenced to six months in jail, all of which was suspended except two days. He was placed on 18 months probation and fined \$500.

On April 5, 1989, Applicant was charged with illegal operation of a motor vehicle (technical charge for DUI and refusing to take a breathalyzer test). Applicant hit a telephone pole, was unconscious, and woke up in the hospital. He had been drinking after breaking up with a girlfriend and was depressed. The collision occurred in a residential area. He pled guilty and was sentenced to six months in jail, all of which was suspended except two days. He was also placed on 18 months probation and fined \$1,000.

On June 11, 1992, Applicant was charged with DUI. He pled guilty and was sentenced to one year in jail, and he served two months of the sentence.

On January 3, 1998, he was again charged with illegal operation of a vehicle/failure to take a breathalyzer (DUI) and failure to drive upon right. He pled guilty to DUI on February 5, 1998, and was placed on probation for one year. The other charge was nolle prossed.

On October 2002, Applicant was charged with (1) failure to drive in the proper lane, (2) operating/towing an unregistered motor vehicle, and (3) Illegal Operation of Motor Vehicle 2nd offense, a felony (technical charge for DUI and refusing to take breathalyzer test.). Counts (1) and (2) were nolle prossed. He was found guilty of the DUI and was sentenced to two years in jail (execution suspended after serving 120 days), 100 hours of community service, and he was required to attend an alcohol awareness program consisting of ten classes. He was placed on probation for three years and ordered to pay a \$1,000 fine and his driver's license was suspended.

As part of one of his sentences, Applicant was required to attend outpatient treatment at a drug and alcohol dependence program. He did so from June 16, 2003 to September 24, 2004. He was also ordered to participate in the program from November 14, 2003 to February 25, 2004, at the referral of his probation officer because he reported to his 9:00 a.m. probation appointment with the smell of alcohol on his breath.⁽³⁾ Applicant admitted he had been drinking the night before attending his appointment.⁽⁴⁾

Applicant filled out a security clearance application (SCA) on August 20, 2003, and in response to Question 24 that asked him to list his alcohol/drug offenses, he listed only the offense that occurred on October 22, 2002. In addition, he only listed that he had to attend alcohol classes and was given a fine. He failed to list that he was sentenced to two years in jail and served four months of that sentence and was on probation for three years, which he was still serving. He claimed he believed he was only required to list his "last" offense.⁽⁵⁾ He also claimed he was nervous so he omitted the other information.⁽⁶⁾ He was aware of his prior convictions, but did not list them because he was told by the person who was administering the SCAs that if he did not know the dates of his other offenses he did not need to provide the information about them and could just bring them up later at an appropriate time.⁽⁷⁾ He also did not list his offenses in Question 26. That question requests an applicant to list any other offenses not previously listed.⁽⁸⁾ He was not sure why he failed to list his other arrests in answering this question. Applicant provided a written sworn statement on November 13, 2003, and failed to mention his other convictions and he again failed to provide information about the complete sentence he was awarded for his 2002 felony DUI conviction. Applicant's testimony as to why he failed to list his convictions was not credible. I find he intentionally and deliberately failed to provide truthful information on his SCA. When provided with an opportunity to correct the information during his interview he still did not reveal his convictions. It was not until three years later when confronted with the facts by an Office of Personnel anagement (OPM) investigator did he admit to the offenses.

Applicant started drinking alcohol when he was 10-11 years old and drank in high school from 1984 to 1988.⁽⁹⁾ He continued drinking from 1988-1990, at a rate of about 10-12 beers on the weekends.⁽¹⁰⁾ He drank about 2-3 beers on the weekends from 1990-1992. He resumed drinking 10-12 beers on the weekends from 1998-2002.⁽¹¹⁾ From 2002 to present he drinks twice a week, usually Friday after work and Sundays during football games.⁽¹²⁾ He estimates he is intoxicated about 2-3 times a year.⁽¹³⁾ He does not believe he is an alcoholic, nor has an alcohol problem.⁽¹⁴⁾ He does believe alcohol has had a negative impact on his life.⁽¹⁵⁾ He explains that the first DUIs were due to immaturity and the other DUIs are attributed to bad judgment.⁽¹⁶⁾ He admits he probably drove a vehicle after drinking, but did not get caught.⁽¹⁷⁾ The last time he was intoxicated was six months ago when he drank approximately a 12 pack of beer.⁽¹⁸⁾

Applicant provided a character letter from a supervisor for whom he has worked for ten months.⁽¹⁹⁾ The supervisor commented that Applicant comes to work on time, is quiet, polite, energetic and strives to complete his tasks quickly and efficiently.⁽²⁰⁾ He has played a key technical role in support of a new design and is instrumental in resolving tasks in a timely manner. He is considered a valuable asset by his supervisor.⁽²¹⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²²⁾ The government has the burden of proving controverted facts.⁽²³⁾ The burden of proof is something less than a preponderance of evidence.⁽²⁴⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽²⁵⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽²⁶⁾

No one has a right to a security clearance⁽²⁷⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽²⁸⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽²⁹⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽³⁰⁾ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline G-Alcohol Consumption-a security risk may exist because excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.

Guideline E-Personal Conduct is a security concern when an individual's conduct involves questionable judgment,

untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guidelines G and E.

I considered all the disqualifying conditions and especially considered Alcohol Consumption Disqualifying Conditions (AC DC) E2.A7.1.2.1 (*alcohol incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use*), and conclude it applies. Applicant has five alcohol related arrests and convictions from 1988 to 2002. Applicant continues to consume alcohol, and does not believe it is a problem in his life, despite his extensive criminal record.

I have considered all the mitigating conditions and especially considered Alcohol Consumption Mitigating Conditions (AC MC) E2 A7. 1.3.1 (*The alcohol-related incidents do not indicate a pattern*), AC MC E2.A7.1.3.2 (*The problem occurred a number of years ago and there is no indication of a recent problem*), AC MC E2.A7.1.3.3 (*Positive changes in behavior supportive of sobriety*); and conclude none apply. Applicant has a history of alcohol convictions and although he received suspended jail time for most of his convictions, he did serve two periods of jail time for four and two months. He continues to drink alcohol, has not changed his behavior, and does not believe alcohol is a problem in his life. He believes he was merely immature and used bad judgment when consuming alcohol and driving. Applicant has not made positive changes in his behavior. He minimally acknowledges that alcohol has had a negative impact on his life. His alcohol incidents clearly indicate an unchecked pattern. He acknowledges he likely has driven after consuming alcohol but was not caught. He admitted he uses bad judgment when drinking alcohol and continues to drink. I find he has failed to mitigate the alcohol consumption security concern under Guideline G.

I have considered Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2 (*The deliberate omission, concealment or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*) and conclude it applies. Applicant only listed one of his alcohol related arrests and convictions. He was not credible in his explanation for why he failed to divulge all of his other convictions. He was still serving probation when he filled out his SCA, but did not divulge this information. I find he deliberately concealed the information and falsified his SCA.

I have considered all of the mitigating conditions and especially considered Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.2 (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*), PC MC E2.A5.1.3.3 (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*), and PC MC E2.A5.A..3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*) and conclude none apply. Applicant deliberately falsified his alcohol arrest and conviction record on his SCA. Later when interviewed he did not divulge the information, despite having an opportunity to do so. I find he attempted to minimize the conviction he did divulge by not listing the complete sentence he was awarded, that is he actually served four months in jail and was still on probation. He listed "fined/classes" as his sentence. He did not correct the falsifications before being confronted with the facts. Applicant eventually revealed the full extent of his criminal conduct. While this marginally reduced Applicant's vulnerability to coercion, exploitation or duress, it is insufficient to fully mitigate the personal conduct security concerns.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into

consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

The Whole Person Analysis

I considered the whole person. I considered Applicant's age when the offenses occurred. I considered the number of alcohol incidents, his periods of probation and attendance at alcohol awareness classes. I also considered Applicant has not made any changes in his behavior. He failed to divulge that he had five alcohol related convictions. Based on all of the facts, I find Applicant failed to mitigate the security concerns under Guideline G, alcohol consumption, and Guideline E, personal conduct. Therefore, I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guideline G and E are decided against Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline G: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Carol G. Ricciardello

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960) as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. Tr. 30-31.
4. Tr. 54.

5. Tr. 39-40.

6. *Id.*

7. Tr. 49

8. Applicant's failure to list his offenses under Question 26 is not considered for disqualifying purposes, but is considered in making a credibility determination as to why he failed to list his offenses in Question 24.

9. GE 3.

10. *Id.*

11. *Id.*

12. Tr.34.

13. Tr. 46.

14. Tr.44, 58.

15. Tr. 55.

16. Tr. 44-45.

17. Tr. 47.

18. Tr. 45.

19. AE A.

20. *Id.*

21. *Id.*

22. ISCR Case No. 96-0277 at 2 (App. Bd. Jul 11, 1997).

23. ISCR Case No. 97-0016 at 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.

24. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

25. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.

26. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.

27. *Egan*, 484 U.S. at 531.

28. *Id.*

29. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

30. Executive Order 10865 § 7.